

**STATEMENT ON IMPEACHMENT OFFERED IN CONJUNCTION WITH
TESTIMONY BEFORE THE JUDICIARY COMMITTEE OF
THE HOUSE OF REPRESENTATIVES
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Mr. Chairman and Members of the Judiciary Committee:

It is a high honor to address you today on the grave and momentous matter of presidential impeachment.

Although I appear at the invitation of the White House, I wish to make it clear from the start that I have no intention of defending the President over his confessed and alleged misdeeds. Lawyers with a far greater familiarity with the evidence than I are far better equipped to do that. Certainly, I do not think that the President is blameless in these matters, as I have said over the years.

Although I have found a great deal to praise about President Clinton's performance since 1993, I have also found some disturbing things in the record. For example, in an article regarding the Whitewater matter written in May 1996 – a year and a half before Monica Lewinsky became a household name – I criticized the President for his occasional impulsiveness, his “imprudence bordering on recklessness,” as well as his tendency to respond to danger by trying “to charm the danger away.”¹ It does not take a Ph.D. to see how that pattern of imprudence and deviousness has played itself out in the Lewinsky matter. And for that, the President has no one to blame but himself.

Instead, I wish to defend the institution of the Presidency, the Constitution, and the rule of law from what I see as the attacks upon them that have accompanied the continuing inquiry into the President's misconduct. In time we will learn how much these

¹ “Flirting With Disaster,” *The New Republic*, May 20, 1996. I should note that although this essay criticized the President, it also concluded that the then-available evidence in the Whitewater matter, which was copious, deserved “to be placed not before a jury, or a special investigator, or a Senate committee, but before the citizenry,” in the then-forthcoming national election (p. 39). I believe that the recent testimony of the Independent Counsel, which has apparently exonerated the President of impeachable offenses in the Whitewater matter, vindicates that conclusion.

attacks have been calculated and how much they have been unwitting. Either way, they are extremely dangerous.

It is no exaggeration to say that upon this impeachment inquiry, as upon all presidential impeachment inquiries, hinges the fate of our American political institutions. *It is that important.* As a historian, it is clear to me that the impeachment of President Clinton would do great damage to those institutions and to the rule of law -- much greater damage than the crimes of which President Clinton has been accused. More important, it is clear to me that any Representative who votes in favor of impeachment but who is not absolutely convinced that the President may have committed impeachable offenses -- not merely crimes or misdemeanors, but high crimes and misdemeanors -- will be fairly accused of gross dereliction of duty and earn the condemnation of history.

Let me address three basic points of historical relevance: The grounds for impeachment as envisaged by the Framers of the Constitution and our understanding of them; the dangers of politicizing and thus trivializing the impeachment process; and the relation between impeachment and the rule of law.

Impeachment, the Framers, and Us

The scholarly testimony on November 9 before the sub-committee regarding the Constitution showed, at mind-numbing length, that there is disagreement over what constitutes grounds for presidential impeachment, as envisaged by the Framers. Yet the testimony also showed that there is substantial common ground. Above all, the scholars agreed that not all criminal acts are necessarily impeachable acts. Only "treason, bribery, and other high crimes and misdemeanors," committed, in George Mason's explicit original language "against the state," would seem to qualify, at least if we are to go by what the Framers actually said and wrote. Or, according to James Wilson of Pennsylvania (generally credited as second in importance only the James Madison as the man responsible for the Constitution's framing), impeachment is restricted to "political characters, to political crimes and misdemeanors, and to political punishments."²

A great deal of the disagreement stems from a small but fateful decision made by the Constitutional Convention's Committee on Style. Before the Constitution reached that committee, Mason's original wording was changed from "crimes against the state" to "crimes against the United States." The committee was charged with polishing the document's language, but with instructions that the meaning not be changed at all. By removing, in Article I, Section 4, the words "against the United States" the Committee created a Pandora's box, which we have opened two hundred and eleven years later.

There can be little doubt that the Committee did not think it has made a substantial

²Max Farrand, ed., *The Records of the Federal Convention of 1787* (revised edition, 4 volumes, New Haven and London, 1966), II, 550; Robert Green McCloskey, ed., *The Works of James Wilson* (2 volumes, Cambridge, Mass., 1967), I, 426.

change. As Gary McDowell, one of the scholars called by the majority, has testified, the standards for impeachment were “obviously clear and unequivocal to the founders.” Discussions in the Convention over the matter had revolved around grave presidential abuses of office that threatened the core of the new political system. Had Mason’s original language or the language about “crimes against the United States” been kept, there would be little doubt that impeachable offenses would be limited to, in the words of another scholar called by the majority, Forrest McDonald, “actions taken in the performance of public duties.”³

The absence of that wording in the final document has persuaded some historians and constitutional scholars that the Constitution’s phrase “high crimes and misdemeanors” embraces all sorts of private crimes. Yet many if not most American historians -- including the nearly 500 who have now endorsed the widely-publicized statement deploring this impeachment drive, a statement I helped to draft and circulate -- hold to the view that Mason’s wording and Wilson’s observation best express the letter and the spirit of what the Framers had in mind. By that standard, the current charges against President Clinton do not, we American historians believe, rise to the level of impeachable offenses.

As further historical evidence, I would point to the fact that the only other occasions when presidential impeachment was pursued, against Presidents Andrew Johnson and Richard Nixon, plainly involved allegations of grievous public crimes that directly assaulted our political system. The proceedings against Nixon led to his resignation because there was a broad bipartisan agreement that he had directly undertaken such assaults. The charges against Johnson eventually failed because there was just enough bipartisan agreement in the Senate that they ought to fail. Today, however, we are faced with, a deeper division, ominously along party lines, about whether the allegations against President Clinton even come close to being impeachable. At least as much in the Johnson case, the current proceedings have evoked fierce and uncompromising partisan responses -- precisely what Alexander Hamilton and the other authors of the Federalist Papers most feared would arise from possible abuses of the impeachment power.

Another pivotal piece of evidence, made familiar by numerous commentators, has to do with the Nixon impeachment. In 1974, the Judiciary Committee declined to approve a bill of impeachment connected to serious allegations that President Nixon had defrauded a federal agency, the Internal Revenue Service. The judgment was that, because the allegations did not directly concern Nixon’s public duties, they had no relevance to impeachment.

Without question, an occasion could arise when it would be necessary to expand on the Framers’ language, to cover circumstances they may have never contemplated, including truly monstrous private crimes. I would hope, for example, that any President accused of murder, even in the most private of circumstances, would be impeached and

³ Gary McDowell, “High Crimes and Misdemeanors: Recovering the Intentions of the Founders; - ” and Forrest McDonald, “Written Statement,” both delivered as testimony to the Sub-Committee on the Constitution, Committee on the Judiciary, House of Representatives, November 9, 1998.

removed from office.⁴ But not even the President's harshest critics, as far as I know, have claimed that the current allegations are on a par with murder.

Various Representatives, scholars, and commentators have offered technically plausible (though, I think, deeply mistaken and misleading) arguments, contending that the allegations against President Clinton rise to an impeachable standard under the definition of crimes against the state. There has been talk of a concerted attack on one of the coordinate branches of government, of a calculated presidential abuse of power (because President Clinton raised issues of executive privileges and because he lied to his aides), and of how perjury by a President, regardless of context, is a fundamental breach of trust that must be punished by impeachment and removal from office. But these assertions rightly sound overwrought, exaggerated, and suspicious to most ordinary Americans, let alone professional historians, when matched against the facts of the case.

Similar magisterial language was used in the impeachment proceedings against President Johnson and had considerable impact inside the Congress. (Johnson too, after all, violated a federal law, much more definitively than President Clinton has.) Since then, though, historians have looked behind the language at the actual facts of the case, as well at the political context of the time. And in general they have concluded that the impeachment effort against Johnson was a drastic departure from what the Framers intended, one that badly weakened the presidency for decades. Johnson's impeachment helped pave the way for the Gilded Age, an age of political sordidness and unremarkable chief executives. How many of us can even remember the names of all those Presidents from Ulysses S. Grant to Theodore Roosevelt?

So, too, later generations of historians will judge these proceedings. I strongly believe that the weight of the evidence runs counter to impeachment. What each of you on the Committee, and your fellow Members of the House, must decide, each for him or herself, is whether the actual facts alleged against the President – the actual facts and not the sonorous formal charges – truly rise to the level of impeachable offenses. If you believe they do rise to that level, you will vote in favor of impeachment and take your risks at going down in history with the zealots and the fanatics. If you understand that the charges do not rise to the level of impeachment, or if you are at all unsure, and yet you vote in favor of impeachment anyway, for some other reason, history will track you down and condemn you for your cravenness. Alternatively, you could muster the courage of your convictions. The choice is yours.

2. Impeachment and Politics

Many commentators have noted, correctly, that presidential impeachment is strictly

⁴ Although, incredibly, the most pertinent historical case here, involving Vice-President Aaron Burr's famous duel with Alexander Hamilton, seems to point in the other direction. Burr was not impeached, even though a Bergen County, New Jersey, court indicted him for murder. See my article, "It Depends on How You Define 'Murder,'" *Los Angeles Times*, November 22, 1998, p. M2.

speaking a political and not a judicial matter. Many of the standard judicial protocols and procedures do not apply in a presidential impeachment proceeding. Yet there is all the difference in the world between a political procedure and a politicized one. A political proceeding is a deliberative, bipartisan, even-handed effort to assess possible political offenses under the Constitution. A politicized procedure, however, overlooks Constitutional standards and heeds other considerations, be they political favors, anger at the President, or pressure from party leaders.

On the basis of recent press reports, I fear that these proceedings are on the brink of becoming irretrievably politicized, more so even than the notorious drive to remove Andrew Johnson from office one hundred and thirty years ago. A quick review of the Johnson affair, in fact, makes our forebears look much better than we do.

Recall the situation.⁵ After succeeding the assassinated President Abraham Lincoln, President Johnson did his utmost to thwart congressional efforts to resolve the issues of the Civil War. Johnson vetoed every law intended to protect the freedom and rights of the freed slaves. Congress overrode those vetoes, but Johnson impeded their enforcement – actions that encouraged lethal reprisals in the South against white Unionists and ex-slaves.

In the midterm elections of 1866, Republicans routed the President and his supporters, gaining a three-fourths majority in the next House and Senate. Yet Johnson remained defiant, vetoing more bills and firing key administrators.

Many overzealous Republicans believed that Johnson's actions amounted to high crimes and misdemeanors, and in 1867, the House twice considered impeachment resolutions. But moderate Republicans defeated them. Then in February 1868 Johnson deliberately disobeyed the recently-passed Tenure of Office Act, designed to curtail the President's power, in part because he wanted to test the act in the courts. It was too much for congressional Republicans, moderates and Radicals alike, and on February 24, 1868, the House impeached Johnson by a margin of almost three to one.

The impeachment was a profoundly serious step. It had nothing to do with the President's private life, or with possibly perjurious deceptions about his private life, but with the political fate of the nation. Moderates had changed their minds and voted for impeachment because they truly believed that the President had committed a high misdemeanor by defying the Tenure of Office Act – a law that had been approved by a three-fourths majority of in Congress, a majority with a huge mandate from the voters. They fully expected the Senate to convict.

In contrast, it seems that today, some Representatives who do not believe that President Clinton has committed an impeachable offense are nevertheless slouching toward a vote for impeachment, under intense political pressure. We hear that some Members think that Clinton must be punished in some way for his legalistic posture, most recently displayed in his responses to the questionnaire sent him by the Chairman of this Committee. We hear that the Majority Whip, Mr. DeLay, is doing his utmost to thwart

⁵ The following paragraphs owe a great deal to conversations with my Princeton colleague, James M. McPherson, on 1868 and 1998, and with his kind permission I have borrowed from his ideas and phrases.

all efforts to censure the president and to insist upon the President's impeachment. We hear that many Members consider the House's action a free vote, since they believe that Clinton's removal from office by the Senate is highly unlikely.

Compared to 1868, the logic is perverse: Impeach a President because you think he will *not* be removed. And this perverted logic turns the impeachment vote into a thoroughly politicized and reckless move: Forget about Constitutional standards and duties and do the short-term political thing, sailing the ship of state into dangerous waters uncharted in this century. Such willingness to pass the buck on so grave and indelible matter as impeachment is a feeble evasion of responsibility and a degradation of conscience.

One of the "profiles in courage" in John F. Kennedy's book of that title was connected to the Johnson impeachment in 1868. It was the story of Edmund Ross who was one of the seven Republicans who voted against Andrew Johnson's conviction. The President escaped conviction by a single vote. Which of those Members today, vacillating over impeachment because of political considerations or sheer frustration with the President, and more than happy to let the Senate take over, could be the subjects for a profile in courage? Profile in cowardice is more like it. Courage or cowardice: Again, the choice is yours.

Impeachment and the Rule of Law

Amid these proceedings, various Committee Members, most eloquently your chairman, have spoken about the need to preserve, protect and defend the American rule of law. No one who has heard those remarks can fail to be alarmed by the vision of a breakdown of the nation's fundamental legal framework, a vision exemplified by the knock at the door at three a.m. But the question before us is this: which represents the greater threat to the rule of law, the impeachment of President Clinton or the refusal to impeach him?

Those who support impeachment naturally think that the latter, refusing to impeach, is the greater threat. Allow a President to get away with suspected perjury and obstruction of justice, and, supposedly, Congress will countenance an irreparable tear in the seamless web of American justice. Impeach the President and, supposedly, the rule of law will be vindicated, if only in a symbolic way, proving forcefully that no American, not even the president, is above the law, and that the ladder of the law has no top and no bottom.

Yet this argument is nonsense, logically and historically. As virtually every commentator before you has noted, American impeachment procedures have never been designed to try and to punish officeholders for criminal behavior. That is what trials before our courts are for -- local, state, and federal. If anyone were to claim that, short of a pardon, President Clinton is forever immune from prosecution, that would indeed represent a breakdown in the rule of law. But no one, not even among the President's staunchest supporters, has come close to suggesting as much. For his alleged crimes and misdemeanors, President Clinton remains highly vulnerable to any number of legal actions. He could be tried by a jury of his peers in a court of law once he leaves office. He could be sanctioned by Judge Susan Weber Wright if she holds that he gave false and

misleading evidence in his deposition in the Paula Jones case. He could be disbarred. In short, he is decidedly not above the law.

Impeachment is reserved for a very select group of Americans, our highest officeholders and justices. It is not designed to root out crime – for that, again, is the responsibility of the police and the courts – but to root out severe abuses of power that pertain to those offices. To confuse the issue by conflating impeachment with ordinary judicial procedures is to do a deep disservice to our Constitution. It is also to denigrate the fundamental strength of the citizenry's basic devotion to the principles and practices of our American court system – something which the failure to impeach President Clinton will not affect one iota, especially since, under that system, he will have gotten away with exactly nothing.

But what about the threat that this impeachment process poses to the rule of law? This entire procedure raises questions, beginning with the independent counsel law under which it began. By establishing prosecutors with unlimited resources, whose reputations depend upon bringing down their prey, the law encourages the remorseless search for the least bit of evidence of any sort of violation, no matter how technical, in the hope that something, anything might stick. We witnessed that process at work in the Iran-contra affair, when Lawrence Walsh saw his prosecution of Oliver North for lying to Congress fail miserably when brought before a Washington jury. We witnessed it at work last week, when after spending \$17 million of the taxpayers' money, Donald Smaltz saw all thirty counts he brought against Michael Espy get rejected by a jury. And, when all is said and done, I believe we will see that a similar process has been at work along the long and winding road that began with Whitewater and has brought us to this chamber today. As Jeffrey Rosen of the George Washington University Law School wrote recently in *The New York Times*, "If House Republicans fail to heed the lessons of the Espy investigation, our faith in the rule of law may be shaken in ways that we can only begin to imagine."⁶

There are those who agree that the independent counsel law has gotten out of hand, but who protest that as long as it is in force, nothing can be done to stop the process. This is hogwash. There is nothing in the Independent Counsel law or in the Constitution which dictates that Congress is duty-bound to follow through to the bitter end each and every referral, especially if Members believe that the Independent Counsel statute is flawed. To paraphrase Brendan Sullivan, Oliver North's attorney, during the Iran-contra hearings, Congress is not a potted plant. In the case of President Clinton, Congress decided to press ahead, rashly I believe. But it can always choose to take another direction as it sees fit. In any event, responsibility for what occurs must rest with the Congress itself, and not with some mythic unalterable process initiated under a law that may very well soon be dropped or radically amended.

But there is something even more dangerous afoot, and it has to do with the increasingly cavalier attitude surrounding this impeachment here in Washington, and especially in the House of Representatives. To say that impeachment doesn't really matter because the Senate will acquit President Clinton is to take a frighteningly myopic view of the costs involved for the nation in pressing forward with a Senate trial. Even if

⁶ Jeffrey Rosen, "Stop, In the Name of the Law," *New York Times*, December 6, 1998, p. WK 19.

the Senate does acquit, the trial will inspire widespread revulsion at Congress, for extending a nauseating process that the voters have repeatedly instructed Congress should cease. More important, it will increase public cynicism about the rule of law by raising serious questions about how easily prosecutors can manipulate criminal charges and judicial proceedings for partisan ends.

4. Conclusion

I began these remarks by discussing President Clinton's accountability for the current impeachment mess. By equivocating before the American people and before a federal grand jury, not to mention before his family and friends, he has disgraced the Presidency and badly scarred his reputation. He has apologized and asked for forgiveness.

But now, as mandated by the Constitution, the matter rests with you, the Members of the House of Representatives. You may decide, as a body, to go through with impeachment, disregarding the letter as well as the spirit of the Constitution, defying the deliberate judgement of the people whom you are supposed to represent and, in some cases, deciding to do so out of anger and expedience. But if you decide to do this, you will have done far more to subvert respect for the Framers, for representative government, and for the rule of law than any crime that has been alleged against President Clinton. And your reputations will be darkened for as long as there are Americans who can tell the difference between the rule of law and the rule of politics.